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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 834

JOHN G. GILES AND JAMES V. GILES,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss or affirm the appeal on the ground that none of the questions presented are substantial federal questions and that at least two of the questions sought to be here reviewed are not properly before this court because they were not timely or properly raised in the proceedings below.

QUESTIONS PRESENTED

1. Whether the trial of the Appellants, for a capital offense, under the provisions of the Constitution of Maryland that the jury are the judges of the law, denied to the Appellants due process and equal protection of the

law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. Whether, in the Appellants' trial for a capital offense, where no request for instructions was made by court-appointed counsel, the failure of the trial judge to give any instructions whatsoever to the jury on the applicable law rendered the Appellants' trial violative of the due process and equal protection clauses of the Fourteenth Amendment.

3. Whether a state trial in a capital case is violative of the due process and equal protection clauses of the Fourteenth Amendment when the jury has the right to determine the applicable legal principles as well as the facts of the case, and when the jury is given no instructions whatsoever by the trial court concerning the applicable law.

For the reasons indicated in subsequent portions of this Motion, it is the position of the Appellee that questions Nos. 2 and 3 above are not properly raised before this Court.

STATEMENT OF FACTS

On the night of July 20, 1961, Joyce Roberts (age 16), her steady boy friend, Stewart Foster (age 21), and two other youths, George Trent and Billy Fellows, drove in Trent's car to an area near Rocky Gorge Dam in Montgomery County to go swimming, arriving between 11:00 and 11:30 P.M. By previous arrangement, they were to meet several friends there, including one of Joyce's girl friends who was to bring Joyce's bathing suit with her (T. 71).* Their friends failing to appear, and the hour growing late, they started to leave and went but a short distance when Trent's car ran out of gas. Trent and Fellows hitched a ride to Laurel to get gas, leaving Joyce and Foster to remain with the car. It was then close to mid-

* References in this form are to pages of the transcript of testimony taken at the trial of the case.

night. The area where they were parked was thickly wooded, desolate and very dark.

Shortly after the departure of Trent and Fellows, Foster observed three colored men, later identified as the Appellants and Joseph Johnson, approaching the car. Alarmed and frightened, Foster rolled up the car windows and locked the doors. The three men, standing together on Foster's side of the car, first demanded money and cigarettes, but Foster told them he had neither. They then went to the rear of the car where one of the men, in the presence of the others, said, "Let's drag his fucking ass out of there and get some of that pussy" (T. 109). Thereafter, the men demanded that Foster turn Joyce over to them (T. 59). Foster told them they would have to kill him to get Joyce, in reply to which one of the colored men said, "Well, I will kill your fucking ass," and another said "Let's shoot the son-of-a-bitch" (T. 34). Following this exchange, the men crashed rocks through the car windows, shattering the glass, and reached inside to unlock the car door. As to this state of events, Foster testified:

> "I was so scared and I said, 'Joyce, make a run for it and I will hold them back as long as I can'." (T. 34).

Pursuant to this plan, Foster jumped from the car and engaged Appellants and Johnson. He was immediately struck in the face with a rock and knocked to the ground, bloody and unconscious. Joyce, in the meantime, got out of the far door of the car and ran into the woods, going about 30 feet when she tripped and fell. Out of breath and unable to run further, she lay quiet, trying to hide in the thick underbrush (T. 60).

After knocking Foster senseless, Appellants and Johnson separated and pursued Joyce into the woods. Appellant John Giles was the first to find her. He lay on top of

her, so that she was unable to move, but did not call to the others (T. 61-62). During this time Joyce could hear Appellant James Giles and Johnson beating through the bushes with sticks looking for her, whistling and calling back and forth to each other. She pleaded with John Giles to let her go farther back into the woods so the other two couldn't find her, telling him that he could follow her later. As to this, Joyce testified:

> "I thought if I could get further away from him, I could get way from all of them" (T. 62).

Shortly thereafter, James Giles and Johnson found them and (as Joyce testified) the three men began "kissing me and everything, and one of them reached for my zipper" (T. 63). Joyce protested but was told, "either you do it or we will do it" (T. 63). Completely dazed (T. 63), alone in the woods with three demonstrably violent colored men, with no one to yell to for help (T. 63), and afraid for her very life (T. 87), Joyce complied by removing her own shorts. She then withstood successive rapes, first by John Giles, then Johnson, and finally James Giles (T. 64). During the final attack, Joyce heard Foster call out that he was going to get the police, but before she could answer she heard him running off (T. 65).

After regaining consciousness, Foster heard Joyce "whimpering" in the woods (T. 44). He made his way to the home of Joseph Cunningham where the police were called. Within minutes, at approximately 12:55 A.M., Sergeant Duvall of the Montgomery County Police Department arrived on the scene. Appellants and Johnson, upon seeing the headlights of the police car, fled through the woods (T. 65). Duvall and Foster searched the woods, finding Joyce lying on the ground, naked to the waist, without shoes, sobbing, and in a semi-conscious state (T. 65, 93, 94). Joyce was taken by ambulance to the hospital

and examined. The medical examination revealed that she had abrasions of the skin over her shoulders, on her knees and legs; that fragments of earth and leaves were adherent to her back; and that she had secretions in the vagina containing numerous spermatozoa cells (T. 47-48).

Appellant James Giles and Johnson were arrested shortly after the crime, James Giles having spent the night hiding in the woods, and having been arrested at his home on the morning of July 21st (T. 113, 174). Appellant John Giles was arrested at a gas station on July 23rd, having spent most of the intervening two days after the crime also hiding in the woods (T. 158). Joyce identified James Giles at a police line-up on July 21st and John Giles at a line-up held on July 23rd as two of the men who had assaulted her (T. 66).

Following their arrest, Appellants were interrogated by Officer Collins of the Montgomery County Police Department and each gave a verbal statement. James Giles admitted that it might have been he who made the statement, "Let's drag his fucking ass out of there and get some of that pussy". He further admitted throwing rocks at the car and chasing Joyce into the woods; that after he found Joyce, he argued with John Giles as to who would be the first to have intercourse with her; that he had intercourse last, after John Giles and Johnson; and that he was having intercourse with Joyce when he saw the police car arriving, at which point he got up and ran into the woods (T. 108-113).

Appellant John Giles, in his statement, admitted his presence at the scene of the crime, admitted chasing Joyce into the woods, but denied that he had intercourse with her (T. 118-119). During his interrogation, he was confronted with James Giles who, in his presence, stated that John was present at the car when the statement was made: "Let's get his fucking ass out of there and take some

pussy". Appellant John Giles did not deny that he was present when this statement was made (T. 112).

At the trial, John Giles testified that it was his brother and Johnson who broke into the car; that the reason for breaking into the car was to prevent Foster, who said he had a gun, from shooting them; that he followed Joyce into the woods and although she insisted he have intercourse with her, he refused. James Giles testified that he went into the woods only to look for his brother, John, and not for Joyce, but that she called him over, took her clothes off, and he had intercourse with her. He testified that he did not know whether or not John Giles had intercourse with Joyce (T. 196).

At the close of testimony neither the State's Attorney nor Defense Counsel made any request of the court that it give instruction to the jury, and accordingly the court confined its comments to the jury to informing it that it could render one of three verdicts — guilty, guilty without capital punishment, or not guilty. Defense counsel remained silent and made no objection to this instruction and made no effort to advise the trial court that in their opinion the failure of the trial court to instruct the jury as to the law applicable to the case constituted a violation of the due process and equal protection clauses of the Fourteenth Amendment.

The jury found each Appellant guilty of rape and the trial judge imposed the death penalty on each.

Thereafter the Defendants filed an appeal to the Court of Appeals of Maryland — the highest court of the State of Maryland — and their brief filed in that proceeding raised, *inter alia*, the following issues:

> "Whether Appellants were denied due process and equal protection of law when the jury exercised the

power given by the Maryland Constitution to determine all the relevant legal principles, as well as the facts of the case?"

"Whether Appellants were denied due process and equal protection of the law by the failure of the trial judge to give the jury any advisory instructions whatsoever on any of the relevant legal principles before it returned the verdict of guilty with the death penalty?"

In its Opinion filed July 18, 1962, the Court of Appeals of Maryland decided the first issue quoted above on its merits and determined that Section 5 of Article XV of the Constitution of the State of Maryland did not violate the due process and equal protection clauses of the Constitution of the United States.

With respect to the second issue quoted above, the Court of Appeals of Maryland, in part (vi) of its Opinion, after noting that there was no objection by the Appellants at the trial of the case to the failure of the court to give advisory instructions to the jury, stated that ". . . since there was no objection to the absence of an instruction, there is nothing before us to review." The court further stated as follows:

"Furthermore, even if it is assumed that the defendants had a constitutional right to have the jury instructed as to the law, it is clear that in a case such as this, where they are represented by competent and experienced counsel, even constitutional rights may be waived by not asserting them."

The Court of Appeals of Maryland thereupon affirmed the judgments of the trial court. Appellants' motion for re-argument was denied on September 19, 1962, and on December 18, 1962, Appellants filed the instant appeal.

ARGUMENT

I. The question of whether Section 5 of Article XV of the Maryland Constitution (permitting a jury in a criminal case to be the judge of the law as well as of the facts) violates the Federal Constitution is insubstantial and unworthy of oral argument before this Court.

The major argument contained in the Appellants' Jurisdictional Statement in support of their contention that Section 5 of Article XV of the Maryland Constitution is in violation of the Federal Constitution is that although the "jury as judge of the law as well as the facts" doctrine was in full force and effect in many of the states of the Union during the nineteenth century, all of these states (with the exception of Indiana and Maryland) have since rejected the doctrine, thus somehow indicating a general feeling that such a doctrine is unfair and improper.

Aside from the fact that a general feeling that a legal doctrine is unfair does not in and of itself mean that it is unconstitutional, this argument of Appellants is fallacious since it is predicated upon the following erroneous assumptions:

(1) that the application of the "jury as judge of the law" doctrine as it presently exists in Maryland is substantially identical to that doctrine as it existed in the nineteenth century in those jurisdictions which have rejected it; and (2) that the various jurisdictions which have rejected the doctrine have done so because they felt it to be inconsistent with the Fourteenth Amendment of the Federal Constitution.

As will be shown below the Maryland system as it presently exists relating to the doctrine of "jury as judge of the law" had undergone such a tremendous change over

the last one hundred years that it bears little if any resemblance to the mid-nineteenth century doctrine which was rejected by various other jurisdictions at that time. The present Maryland system and its application, has far more in common with the systems now found in her sister states than with the "jury as judge of the law" system as it existed in both Maryland and a large number of other jurisdictions in the last century. These changes in the Maryland system have effectively removed any objections which might have been raised in the past relating to the question of the fundamental fairness of such a doctrine.

As will be further shown below most of the jurisdictions which have rejected the doctrine in its unmodified form have not done so because of any fear that it violated the due process and equal protection clauses of the Federal Constitution, but rather because of numerous other unrelated reasons such as, for example, a realization that they had been mistaken in their belief that the "jury as judge of the law" doctrine was a part of the common law of England.

Section 5 of Article XV of the Maryland Constitution has been a part of the organic law of the State of Maryland for over one hundred years. It appeared as Section 5 of Article V of the Constitution of 1851, as Section 4 of Article XII of the Constitution of 1864 and as Section 5 of Article XV of the present Constitution which was adopted in 1867. Its purpose, the political philosophy which it represents, and its effects have been considered by the Court of Appeals of Maryland on a number of occasions, *Slansky v. State*, 192 Md. 94, 63 A. 2d 599 (1949), *Demby v. State*, 187 Md. 7, 48 A. 2d 586 (1946), and cases cited therein, and have been fully discussed by bench and bar. See Chesnut, *The Courts and The Press*, 31 Md. St. Bar Ass'n.

Rep. 76 (1926); Markell, *Trial by Jury — A Two- Horse Team or One-Horse Team?*, 42 Md. St. Bar Ass'n. Rep. 72 (1937); Dennis, *Maryland's Antique Constitutional Thorn*, 92 Pa. L. Rev. 34 (1943); Henderson, *The Jury as Judges of Law and Fact in Maryland*, 52 Md. St. Bar Ass'n. Rep. 184 (1947). See also, Debates on Subject "*In The Trial of All Criminal Cases The Jury Shall Be The Judges Of Law As Well As Of The Fact*", 39 Md. St. Bar Ass'n. Rep. 71, 80, 92, 104 (1934); Note, 1 Md. L. Rev. 175 (1937); Prescott, *Juries as Judges of the Law: Should the Practice be Continued*, Daily Record (Legal Newspaper of Baltimore), June 25, 1955; Invernizzi, *Maryland's Antique Constitutional Thorn Revisited*, *Daily Record* (Legal Newspaper of Baltimore), June 21, 1960.[1]

In Howe, *Juries As Judges of Criminal Law*, 52 Harvard L. Rev. 582 (1939), the decisions of the early American courts with respect to the function of the jury in a criminal case as judges of the law are examined, as are the opinions of Jefferson, Adams and others and the debates of Congress on the Sedition Act in 1798. It is pointed out that several of the charges brought against Mr. Justice Samuel Chase in his impeachment proceedings in 1805 were founded upon his alleged interference with the right of criminal juries to judge the law. The main thesis of the author is to show the techniques adopted by various courts and states

[1] In general, these writers agree that the constitutional provision is Maryland's solution to an inherited problem which, in its early days, revolved around the jury's *right* to disregard the law as expounded by the court as distinguished from its *power* to do so. In England, solution of the problem was not had until the famous Dean of Asapah's case, *Rex v. Shipley*, 4 Douglas 73, 21 Howell's State Trials 847 (1784). That the constitutional provision was declaratory of the existing Maryland rule was established in *Franklin v. State*, 12 Md. 236 (1858). For earlier cases as evidence of the rule in Maryland prior to the Constitution of 1851, see *State v. Buchanan*, 5 H. & J. 317 (1821); *Baker v. State*, 2 H. & J. 7 (1806); *Dorsey's Lessee v. Hammond*, 1 H. & J. 190 (1803).

in departing from what the author concludes was the great weight of authority in this county, at first thought to be supported by authority in England, namely, that in criminal cases juries were judges of the law. Although the author now finds that by the great weight of authority at the present day juries in criminal cases are restricted to judging the facts, this change was gradual and extended well into the period contemporaneous with the actual adoption of the Fourteenth Amendment.

For example, in states other than Maryland, it is found that in Vermont the right of criminal juries to judge the law was sustained in *State v. McConnell*, 32 Vt. 491 (1860) and not changed until *State v. Burpee*, 65 Vt. 1, 25 A. 964 (1892). In Pennsylvania, that right was recognized in *Kane v. Commonwealth*, 89 Pa. 522 (1879) and there was no definitive abridgement thereof until *Commonwealth v. Castellana*, 277 Pa. 117, 121 A. 50 (1923). Louisiana recognized the right in *State v. Scott*, 11 La. Ann. 429 (1856) and *State v. Saliba*, 18 La. Ann. 35 (1866), while modification of it began in *State v. Tally*, 23 La. Ann. 677 (1871). In Georgia, the right was recognized in *Dickens v. State*, 30 Ga. 383 (1860) and not changed until *Brown v. State*, 40 Ga. 689 (1870). In Tennessee that right was affirmed in *Nelson v. State*, 2 Swan 482 (1852), *Withers v. State*, 1 Shannon 276, 3 Leg. Rep. 106 (1874) and *Derman v. State*, 1 Shannon 374, 3 Leg. Rep. 184 (1875) and not changed until *Harris v. State*, 7 Lea 538 (1881), although from some broad language in *Ford v. State*, 101 Tenn. 454, 47 S.W. 703 (1898), remnants of it still existed. Connecticut recognized the right in *State v. Buckley*, 40 Conn. 246 (1873), *State v. Hoyt*, 46 Conn. 330 (1879) and *State v. Thomas*, 41 Conn. 546 (1880), while modification thereof began in *State v. Fetterer*, 65 Conn. 287, 32 A. 394 (1894) and continued in *State v. Main*, 69 Conn. 123, 37 A. 80

(1897) and *State v. Gannon*, 75 Conn. 206, 52 A. 727 (1902). Similarly, in Illinois, the criminal jury as judges of the law was the rule recognized in *Schnier v. People*, 23 Ill. 17 (1859), *Fisher v. People*, 23 Ill. 283 (1860) and *Millinix v. People*, 76 Ill. 211 (1875) while a modification of the rule was recognized in *Juretich v. People*, 223 Ill. 484, 79 N.E. 181 (1906). In Indiana, acceptance of the criminal jury's right to judge the law continued as late as *Williams v. State*, 10 Ind. 503 (1858), although the unrestricted right has now been modified. See *Burris v. State*, 218 Ind. 601, 34 N.E. 2d 928 (1941), *Steinbarger v. State*, 266 Ind. 598, 82 N.E. 2d 519 (1948).

Historically, therefore, the evidence is overwhelming that the Fourteenth Amendment was never thought to prohibit the jury in a criminal case from judging the law nor was it intended to have that effect. The concept of equal protection, due process of law of the land does not dictate judge-made law in criminal cases, which a jury is bound to follow, whatever may be said of the wisdom or desirability of such an effect.

This Court has stated on a number of occasions in other instances that the Fourteenth Amendment does not require uniform state administration of criminal law, but rather leaves the states free to work out their own procedure. *Fay v. New York*, 332 U.S. 261, 91 L. Ed. 2043 (1947); *Bute v. Illinois*, 333 U.S. 640, 92 L. Ed. 986 (1948); *Gardner v. Michigan*, 199 U.S. 325, 50 L. Ed. 212 (1905); *Mallett v. North Carolina*, 181 U.S. 589, 45 L. Ed. 1015 (1901).

Whereas the jurisdictions noted above, with the exception of Indiana, chose outright rejection of the doctrine, Maryland, beginning in the middle of the nineteenth century, began a process of judicial modification of the rule.

These modifications, in conjunction with statutory and constitutional changes in Maryland criminal procedures, have effectively removed any objections which might previously have been made to the system.

In its most classic sense the "jury as judge of the law" doctrine elevates the jury to the role of a judge in the sense that all decisions of a legal nature to be made during the course of a trial are to be made by it, while the function of the judge is that of a referee whose primary responsibility was to keep order and to see that the trial proceeded in an orderly fashion. Such a system did not work badly in a community where a large percentage of the judges were laymen and, therefore, no better equipped to pass upon such matters than the jury. See Warren, *History of the American Bar* (1911); *Kane v. Commonwealth*, 89 Pa. 522, 527 (1879); Howe, *Juries as Judges of Criminal Law*, *supra*, at p. 591. In Maryland, for example, until 1790 none of the judges of the county courts were required to be lawyers, and between 1790 and 1805 only one out of three was required to be a member of the bar. See Carroll T. Bond, *The Court of Appeals of Maryland*, A History (1928) pp. 88-107, Henderson, The Jury as Judge of Law and Fact in Maryland, supra.

In the latter part of the nineteenth century and early part of the twentieth, as the Maryland judiciary became more sophisticated in the law, the judicial and statutory modifications of the rule began. However, even in the early part of the nineteenth century the Maryland Court of Appeals was of the opinion that advisory instructions were given almost conclusive weight by the jury when it noted in *State v. Buchanan*, 5 H. & J. 317, (Md. 1821) that "juries, who though (by the laws and practice of the State) they have a right to judge both of the law and of the

fact, in criminal prosecution should, and usually do, respect the opinions and advice of judges, on questions of law, and would seldom be found to put themselves in opposition to the decisions of the supreme judicial tribunal of the state."

Whereas apparently in a number of jurisdictions the jury was allowed to pass upon the constitutionality of laws (see 3 Wharton *Criminal Law*, 7th Ed. (1874) Sec. 3262 et seq.), Maryland in the case of *Franklin v. State*, 12 Md. 236 (1858) held that only the judge had this right. In *Smith v. State*, 106 Md. 39, 66 Atl. 678 (1907), it was held that the jury had no right to pass upon pre-trial motions. See also *Gray v. State*, 173 Md. 690, 195 Atl. 591 (1937).

In *Bell v. State*, 57 Md. 108 (1881) the court affirmed the existing practice of not permitting the jury to pass upon the admissibility of evidence. See also, *Vogel v. State*, 163 Md. 267, 162 Atl. 705 (1932). In *Beard v. State*, 71 Md. 275, 17 Atl. 1040 (1889) it was held that the court could on its own motion, when it thought proper, instruct the jury as to the law, and now under Rule 756 of the Maryland Rules of Procedure the court is *required* to instruct the jury upon motion of counsel. See also *Luery v. State*, 116 Md. 284, 81 Atl. 681 (1911). Of importance to the accused was the knowledge that an erroneous instruction by the court, if objected to was reviewable on appeal. See, for example, *Swann v. State*, 64 Md. 423, 1 Atl. 872 (1885).

The holding in *Vogel v. State*, supra, the principle of which is now incorporated in Maryland Rule 756e, was a significant step in making the constitutional provision less effective. In *Vogel* it was held that the trial court could defer giving instructions until the conclusion of the argu-

ment and thus preclude counsel from arguing to the contrary.

The greatest inroad into the "jury as judge of the law" doctrine was made in 1950 when Section 5 of Article XV of the State Constitution was amended to give the Court of Appeals of Maryland the power to review the sufficiency of the evidence offered by the State to obtain a conviction.[2] Theretofore all reviews of criminal convictions had been confined to appeals from demurrers to the indictment, appeals from rulings on the evidence, and appeals challenging the correctness of instructions to the jury (see Note in 1 Md. L. Rev. 175). To implement this constitutional amendment a statute, now codified as Section 593 of Article 27 of the Annotated Code of Maryland (1957 Edition), was enacted permitting the trial court to direct a verdict in favor of the Defendant when there was insufficient evidence to sustain a conviction. See also Rule 755, Maryland Rules of Procedure.

Thus, whereas formerly this State provided no safeguards against the act of a jury in ignoring the established law of the State of Maryland, now the accused may secure relief by means of a directed verdict in the event that the jury chooses to apply a more stringent rule of law. The protection to the Defendant afforded by this newly established right has become even more meaningful since 1950 in the light of the great strides which have been made to assure to a criminal defendant a fair trial and a right of appeal. As a result of the decisions of this court in cases such as *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956); *Chewning v. Cunningham*, 368 U.S. 443, 82 S. Ct. 498, 7 L. Ed. 2d 442

[2] For a discussion of the circumstances leading up to the ratification of this amendment see editorial in 11 Md. L. Rev. 319 (1950) "Criminal Procedure Reform Achieved in Maryland."

(1962); and *Hudson v. North Carolina*, 363 U.S. 697, 80 S. Ct. 1314, 4 L. Ed. 2d 1500 (1960), the Maryland Courts now appoint counsel at the trial and appellate level in all cases of even a mildly serious nature. See Rule 719 of the Maryland Rules of Procedure which requires appointment of counsel in all cases where the possible penalty is confinement in the penitentiary for five years or more, and permits the appointment of counsel in all other cases where the court after taking into account the complexity of the case, age, experience, and mental ability of the accused, determines that counsel is needed.

Criminal defendants have been quick to take advantage of this newly expanded right to appeal. For example, in the 1955 term of the Court of Appeals of Maryland of the 186 opinions rendered, 17 (9%) represented criminal cases. By the 1961 term, out of 291 opinions rendered, 86 (29.6%) represented criminal cases.[3]

Thus the present day criminal defendant, tried before the Maryland courts, has the safeguard of a directed verdict (referred to as a judgment of acquittal — see Maryland Rule 755) at the trial level and a review on appeal of the sufficiency of the evidence used to convict him. Consequently, if the jury, through its own definition of the law, finds the defendant guilty on the basis of evidence which, when viewed in the context of the existing law of the State of Maryland, is insufficient to convict,

[3] Annual Report 1961-62 Administrative Office of the Courts, State of Maryland. Speaking of this increased case load of the Court of Appeals, the Report, at p. 15, states as follows:

"Another table classifying the cases as to types reveals that the bulk of the increase in the Appellate Court's case load was in law cases. It also indicates that the number of criminal appeals is starting to level off after a constant year to year rise since 1955. Almost three quarters of these appeals originated in Baltimore City, the bulk of them being filed by indigent defendants with costs paid by the State."

then he may have this injustice remedied by the trial court, or on appeal. This safeguard insures that a criminal defendant will, at the very minimum, be tried by the fixed law of this state.

In the light of these recent safeguards, the present day effect of having the jury as the judge of the law as well as the facts means that for the most part any deviations from the existing law which the jury can safely make are deviations in the favor of, rather than to the prejudice of, the criminal defendant. Thus, whereas the jury can no longer convict on the basis of insufficient evidence it can still acquit even in the face of conclusive evidence of guilt. It is apparent that even in the last century the prevailing opinion was that the "jury as judge of the law" doctrine operated more favorably for the accused than for the State. This is borne out by the fact that by far the greatest number of cases raising the question of the propriety of advisory as opposed to binding jury instructions are appeals by convicted defendants who challenge the right of the judge to give *binding* instructions. See, for example, *Juretich v. People* (Ill.), *supra*; *Burris v. State* (Ind.), *supra*; *State v. Buckley* (Conn.), *supra* and numerous of the other cases cited in Prof. Howe's article in 52 Harv. L. Rev. cited *supra*. A case such as the instant one where the criminal defendant challenges the right of a judge to give advisory instructions only, is somewhat of an anomaly.

Contrasting the present Maryland law, which has virtually emasculated the "jury as judge of the law" doctrine, with that doctrine as it existed during the last century when it was rejected by many of the states shows that Maryland, by attrition, has accomplished what other jurisdictions did by outright rejection. Shortly before the time the federal courts first began to reject the doctrine in

United States v. Battiste, 2 Sumner 243, Fed. Case No. 14,545, 24 Fed. Case 1042 (C.C. Mass., 1835) Justice Chase of the Supreme Court had announced on a number of cases that the Supreme Court had no authority to pass upon the constitutionality of statutes, and in the words of Wharton in "in *Frie's* case stated that 'The jury are to decide on the present and in all criminal cases both the law and the facts, on their consideration of the whole case.'" See 2 Wharton on *Criminal Law*, 5th Ed. (1861), Sec. 3095, p. 649 et seq.[4] As late as 1873 Connecticut permitted juries to pass upon the constitutionality of laws. See *State v. Buckley, supra.*

In addition in the nineteeth and the early part of the twentieth centuries appellate review did not provide the judicial safeguards against erroneous jury actions which are now available in Maryland, and thus the courts of the last century had far more justification than now for rejection of the "jury as judge" doctrine. Dean Pound in his treatise *Jurisprudence*, Vol. 5, § 148 at p. 625, discusses the appellate review procedures of the last century and describes the writ of error (the usual procedure) as "cumbrous, dilatory, expensive, extremely technical, and tied to the formal record so as often to review anything but the case itself except as it could be gathered from the pleadings." Commenting on the general unavailability of appellate review in criminal cases, Nathan A. Smyth in 1904, in an article entitled "The Limitation of the Right of Appeal in Criminal Cases", 17 Harv. L. Rev. 317, stated at p. 319 as follows:

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[4] In the words of Wharton at p. 651: "No better illustration of Judge Chase's character can be found than in the fact, that in the very case where he thus recognized the power of the jury over the law, he succeeded, by stopping counsel when they undertook to dispute the law he laid down, in raising a turmoil, which ended in his own impeachment."

> ". . . Whether or not an appeal is taken depends very little on the chances of securing a reversal, very greatly on the ability of the convict to pay counsel fees. It costs to appeal. The expense of counsel fees is certain, and there is a large contingent cost in case of failure. A very small number of convicted persons can afford it."

Contrasted with today's simplified appeal procedures — available to rich and poor alike and designed to insure that no conviction is against the weight of the evidence — the procedures of fifty years ago show how much the criminal defendant, often without counsel, was at the mercy of the trial court and jury. Accordingly, the courts of the last century were more concerned in building what they conceived to be judicial safegards at the trial level since, for all intents and purposes, there was no effective appellate review for the great bulk of the criminal defendants. In Maryland in the present era, with effective and available appellate review, coupled with the assistance of counsel at all stages and the right of a directed verdict at trial, any capricious action of the jury may be quickly and effectively dealt with. Consequently there is no longer any fear of the damage which might have formerly arisen when the jury, in the face of insufficient evidence, nevertheless brought back a verdict of guilty because of an erroneous conception of the law.

An examination of the decision of the courts of the States which have rejected the "jury as judge of the law" doctrine discloses that in a great majority of the cases their reasons for so doing do not include a fear that the doctrine is in violation of the Federal Constitution. See for example, *Commonwealth v. McManus*, 143 Pa. 64, 21 Atl. 1018 (1891); *State v. Wright*, 53 Me. 328 (1865); *Pierce v. State*, 13 N.H. 536 (1843); *Dejarnette v. Common-*

wealth, 75 Va. 867 (1881); *State v. Gannon, supra; Commonwealth v. Anthes*, 5 Gray 185 (Mass. 1857). The very few cases which mention a possibility of a conflict with the Federal Constitution were, nevertheless, disposed of on an adequate non-federal ground. See *State v. Burpee*, 65 Vt. 1, 25 Atl. 964 (1892), and *State v. Wright*, *supra*. In many cases the basis for the decision was that, since at common law the juries had no power to judge the law, to permit them to do so was inconsistent with state statutory or constitutional provisions providing that so much of the common law of England as was applicable to the local situation and circumstance and was not repugnant to the constitution or laws, should be law in the state, or some similar type of pronouncement. See, for example, *State v. Burpee, supra; State v. Gannon, supra*, and cases cited in Howe, *Juries as Judges of Criminal Law, supra*, p. 596, et seq. Thus, although these cases indicate a dissatisfaction with the operation of a rule in the context of the administration of justice in a prior century, they cannot be said to stand for the proposition that the Maryland constitutional provision, in the context of the present Maryland criminal procedure, with its greatly enhanced safeguards, violates the Fourteenth Amendment of the Federal Constitution.

Significantly the Federal Courts, when rejecting the "jury as judge of the law" doctrine did not do so upon the ground that it violated the due process clause of the Fifth Amendment, but rather that it violated the right to a jury trial as provided in the Sixth Amendment. *Sparf and Hansen v. United States*, 156 U.S. 51 (1895). The Sixth Amendment insofar as it relates to the right of an accused to a trial by jury is not applicable to the states. *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

The Appellants suggest, at pages 22 and 23 of their Jurisdictional Statement, that the situation may arise where, although there is sufficient evidence under the view of the law which the court would take, the jury may have rejected that view and found the facts in such a fashion that, under a correct view of the law, would compel an acquittal but under an incorrect view of the law would result in a conviction. This possibility, however, exists irrespective of whether the jury is given binding or merely advisory instructions.[5] The practice of fining jurors for bringing in a wrong verdict was abolished long ago in England in *Bushel's Case, Vaughan* 135 (C.P.), 6 How. St. Tr. 999 (1670), and has never found favor in the United States and hence jurors have the power through use of a general verdict to deal with the case as they see fit irrespective of the type instruction given them. If jury lawlessness, in the situation which Appellants suggest, is to be curtailed, the means of doing so is not by requiring binding as opposed to advisory instructions, but rather by requiring that the jury bring in a series of special verdicts with respect to the various issues of fact which may be involved in the case. It is the general verdict and not the advisory instruction which is the real cause of the problem suggested by Appellants. That general verdicts are a cause of jury lawlessness is recognized by Dean Pound in Vol. 5 at p. 26 of his treatise where he notes as follows:

> "As to the jury, there has been a steady growth of means of minimizing their power of dispensing with

[5] Dean Pound in his treatise on Jurisprudence recognizes this as a fact of life in the administration of justice when he notes in Vol. 5 at page 25 that the jury possesses "(t)he power to find the facts in such a way as to compel a different result from that which the legal rule, strictly applied, would require." At page 28 Dean Pound describes that as one of a ". . . series of mitigating devices for introducing discretion into the (law's) application."

> the law. Giving up the 'scintilla' doctrine, direction of verdicts, and putting special questions to the jury instead of leaving the whole case to a general verdict, have tempered jury lawlessness."

Also, had the Appellants been genuinely concerned with the possibility suggested above, and had they felt that the fault lay in the practice of advisory instructions, they had the right, under Maryland criminal practice, to waive a jury trial and elect to be tried by the court. See Rule 741 of the Maryland Rules of Procedure. Admittedly, although the Fourteenth Amendment does not demand the use of jury trials in a state's criminal procedure, if a state provides for one the actual conduct of the trial must be in accordance with the standards of Due Process. *Irvin v. Dowd, supra.* However, in the instant case, unlike in *Dowd,* the form of the trial was known in advance to the Defendants so that they could make an intelligent decision as to whether to elect a court trial. In *Dowd,* and the cases cited therein, the elements of unfairness arose after the selection had been made, and involved the matter of whether or not the jurors could reach an impartial verdict. The instant case is not one such as *Dowd* where a state holds out to an accused a procedure which, in its normal operation, is fair, and then, when the accused avails himself of it, conducts the procedure in such a manner as to result in an unfair trial. Any unfair limitation contained within the Maryland jury trial procedure, and it is respectfully submitted that there is no element of unfairness in that procedure, is known to all defendants long before trial and its operation is uniform upon them all. If they wish to avoid it, they may do so by waiving a jury trial.

In summary, as can be seen from the above, the first issue which Appellants seek to raise on this appeal, when

viewed in the context of present day Maryland Criminal Procedure, is of no real merit. Coupled with this is the fact that such an issue could arise in only two states of the United States and even then is not likely to be raised since the "jury as judge of the law" rule operates to the favor of, rather than to the prejudice of, a criminal defendant. Accordingly, it is respectfully submitted that this issue is insubstantial in nature and the decision of the Court of Appeals of Maryland thereon should be summarily affirmed.

II. The question of whether the failure of the trial judge to give any instructions to the jury when no request therefor was made by the Appellant cannot be raised in this appeal since it was not properly preserved in the proceedings below.

The Court of Appeals of Maryland, in part (vi) of its Opinion held that it was not required to pass on the merits of Appellants' contention that it constituted a denial of due process and equal protection of the laws for the judge not to give the jury any advisory instructions on the legal principles involved in the case. As reason for this, the court determined that the failure of the Appellants during trial to either request instructions or to object to the failure of the court to give instructions amounted to a waiver of the right to raise such an issue.

Maryland Rule 756b of the Maryland Rules of Procedure states that the trial judge "may, and at the request of any party shall, give such advisory instructions to the jury as may correctly state the applicable law . . ." Thus had the Appellants made such a request the instructions would have been forthcoming. Rule 756c also provides that in the event no such request is made, the question of whether or not such instructions are to be given is discretionary with the judge.

In attempting to fathom the action of Appellants in failing to request instructions, the Court of Appeals of Maryland in their opinion had this to say:

> "Although there is nothing in the record to so indicate, it may be assumed that the State's attorney as well as the defendants, who were represented by an able and experienced attorney, deliberately chose not to request instructions or object to the failure to give them, in order to be in a position to argue the law of the case to the jury without prior or subsequent instructions by the court contrary to what they anticipated arguing or had already argued to the jury."

That Appellants' counsel was able and qualified can hardly be disputed in view of the fact that he served in the capacity of an Assistant Attorney General of the State of Maryland from January 17, 1955, to January 8, 1957, and as the Deputy Attorney General from January 9, 1957, to January 24, 1961. That he was familiar with matters of criminal law is evident from the fact that during his service in these offices he participated extensively in the argument of criminal cases before the Maryland Court of Appeals. See, for example, *Swift v. State*, 224 Md. 300, 167 A. 2d 762 (1961); *Nelson v. State*, 224 Md. 374, 167 A. 2d 871 (1961); and *Presley v. State*, 224 Md. 550, 168 A. 2d 510 (1961), to name a few of the more recent ones.

Accordingly, it cannot be said that the instant appeal involves a situation where the accused, represented by experienced counsel, unwittingly permitted the commission of error and neglected to register an objection thereto. Instead, an indicated by the above quoted excerpt from the court's Opinion, the proper assumption is that trial counsel consciously did his best to see that no instructions were given for fear that once given they might destroy any chance for acquittal which might exist. Such a trial tactic would undoubtedly be wise in view of the fact that if the

court had given the jury instructions their subject matter would undoubtedly have included a statement informing the jury that under Maryland law the mere fact that a victim submits to intercourse is no defense if that submission is induced by a fear or a realization that rape is inevitable. See *Hazel v. State*, 221 Md. 404, 157 A. 2d 922 (1960).

In the instant case all of the indications are that with respect to this issue the Appellants are trying to have their cake and eat it too. It would appear that during the course of the trial below they deliberately refrained from asking for jury instructions in the hope that the jury would adopt a construction of the law favorable to them, while now they are seeking to blame the alleged unfairness of their trial upon their own calculated inaction. If the situation was of their own making, they should not be permitted to profit from it.

CONCLUSION

In view of the above it is respectfully submitted that the question raised by Appellants relating to the constitutionality of Section 5 of Article XV of the Maryland Constitution is not a substantial federal question; and that the question raised by Appellants relating to the act of the trial court in not giving instructions to the jury were not preserved by Appellants at the trial of the case and were properly disposed of by the Court of Appeals of Maryland on an adequate non-federal ground.

Respectfully submitted,

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